THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2013-CP-40-02159

Frieda H. Dortch .....Appellant,

v.

City of Columbia Planning & Development Services/Zoning Division..... Respondent.

INITIAL BRIEF OF RESPONDENT

Peter M. Balthazor
S.C. Bar Number 68244
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
Phone: (803) 737-4242
Fax: (803) 737-4250

Attorney for Respondent

TABLE OF CONTENTS:

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Whether the current appeal should be dismissed because the same claim between the same parties is currently pending in the circuit court.

II. Whether a prior application for a variance, which was denied, bars a subsequent application for a variance, where the applicant has not shown a change of circumstances from the time of the earlier application.

STATEMENT OF THE CASE

The present appeal is the latest chapter in Appellant's continuing effort to use the building located at 825 Heidt Street as a duplex. Appellant, Frieda H. Dortch, filed successive, and nearly identical, applications for a variance from the City of Columbia Zoning Ordinance in 2008 and 2012. (Ex. A to City's Memo in Support of Motion to Dismiss; Appl. for Variance, dated 11.14.12). As required by state statute and the City's Zoning Ordinance, the Board of Zoning Appeals (hereinafter the "board") conducted a public hearing on each application, reached the merits, and denied each request. Appellant sought circuit court review of each decision. In the most recent case, the circuit court found that the doctrine of res judicata barred the appeal, and the court dismissed the appeal. Appellant now contends in this appeal that it is entirely permissible for her to file a successive application for a variance where an earlier, nearly identical application had been denied on the merits.

This saga begins as far back as May 14, 2008, when Appellant filed an Application for a Certificate of Zoning Compliance-Nonconforming. (Appl. for Cert. of Zoning Compliance). This application, and the accompanying letter, sought to "maintain the grandfather status" so that

the building on the property could be utilized as a duplex. (Ex. B, to City's Memo in Support of Motion to Dismiss). The Zoning Administrator determined that a duplex would be a nonconforming use and would not be permitted on the property. (Ex. C, to City's Memo in Support of Motion to Dismiss). Appellant applied for administrative review of the Zoning Administrator's decision, and, after a hearing on September 9, 2008, the board denied the application in a written decision dated January 16, 2009. The written decision upheld the Zoning Administrator's decision regarding the nonconformity of a duplex. (Ex. D to City's Memorandum in Support of Motion to Dismiss; Written decision dated January 16, 2009 in Case No. 08-060-AA). As a result of this decision, the property lost its legal nonconforming status and could no longer be used as a duplex. Use of the property as a duplex was nonconforming because the lot size was not large enough to accommodate a duplex. (Ex. C, to City's Memo in Support of Motion to Dismiss).

Concurrently, on June 11, 2008, Appellant applied for a variance to the lot size requirement in order to "re-establish a duplex" on the real property. (Ex. A to City's Memo in Support of Motion to Dismiss). In order to "re-establish a duplex," a variance would have been necessary because the lot size was not large enough to accommodate a duplex. After a full hearing on the merits, the board denied Appellant's request for a variance in a written decision dated January 16, 2009. (Written decision of the board, in Case No. 08-051-V; Minutes of July 8, 2008, board meeting).

Appellant, pro se, sought circuit court review of the two 2009 decisions. Appellant appealed both of the 2009 decisions in the same civil action. The circuit court dismissed the

appeal after finding that it had been untimely filed. (Order dated Sept. 1, 2010). Appellant filed a motion for reconsideration. Appellant asserts that this motion has not been decided.[1]

Over three years passed from the time of the original application for a variance, and on November 14, 2012, Appellant again filed an Application for Variance from the lot size in order to use the building on the property as a duplex. (Appl. for Variance, dated 11.14.12). The application set forth the requirements of the zoning ordinance and the relief requested from the strict application of the ordinance. (Id.) The zoning ordinance required 5,000 square feet per dwelling unit. However, the total lot size of Appellant's parcel is only 6,786 square feet. (Id.) Therefore, Appellant was seeking a significant departure from the lot size requirements found in the City's zoning ordinance.

The board proceeded to hear this matter on February 12, 2013. (Minutes of February 12, 2013, board hearing). The board denied the variance request and issued its written decision on March 12, 2013. (Written decision dated March 12, 2013). Appellant again sought circuit court review of this second variance request. (Petition of Appeal, dated April 11, 2013). Respondent moved to dismiss the matter on the grounds of res judicata and/or collateral estoppel. (Motion to Dismiss, dated April 30, 2013). The circuit court heard the matter and ruled that Appellant's appeal was barred by the doctrine of res judicata. The circuit court dismissed the appeal. (Order dated Aug, 19, 2013).

While it is not at all germane or relevant to the current appeal, Appellant takes pains in her Statement of the Case to point out that she was allegedly being prosecuted by the City for not proceeding with repairs for which the City had denied her a permit. (App. Br. At 4, 16). This has

[1] Respondent acknowledges that Appellant filed a motion for reconsideration from the 2010 order. However, inexplicably, Appellant never sought a ruling on this motion, but instead filed a successive application for a variance in November 2012.

nothing to do with the variance request because it is clear from the record why a permit may have been denied for repair work. As explained at the hearing on February 12, 2013, Appellant was seeking a permit to perform work for a duplex, but, as established by the 2009 decisions, the use as a duplex had been lost. (Minutes, Feb. 12, 2013, p. 3) The Zoning Department could not issue a permit for a duplex. See City Code § 17-83 (stating that a "zoning permit shall not be issued by the zoning administrator except in conformity with the provisions of [the zoning ordinance]"). A building official also explained that there were property maintenance concerns regarding the exterior of the home.[2] (Feb. 12, 2013, minutes at p. 6). There is nothing, as far as Respondent is aware, preventing Appellant from obtaining a permit to perform work to a single-family home. Therefore, Appellant's claim that the City has wrongfully denied a permit, and is prosecuting her for not performing work as a result, is misleading, at best.[3]

Appellant lists seven issues for consideration by the Court, which appear to fall under three broad arguments made in the body of Appellant's brief. According to the Arguments listed in Appellant's Table of Contents, Issues 4-7 are addressed in Argument III. (pp. 9-23). Issue 6, as stated in the Statement of Issues on Appeal, appears to address arguments and issues concerning whether there had been a change of circumstances between the first application for variance and the second application. As will be shown herein, Respondent submits that this is the standard by which it can be determined if res judicata will bar a successive application. However, other than the bare assertions stated in Issue 6, and one sentence on page 16 of the brief, Appellant does not submit any argument that the circuit court erred in determining that

---

[2] Respondent can only surmise that it is property maintenance violations for which Appellant is being prosecuted in the municipal court. Appellant has not provided any evidence in the record of citations or convictions for ordinance violations.

[3] In addition, counsel for Appellant agreed at the circuit court hearing that whether a ticket had been issued for not fixing the house was not something the court could take into consideration in determining the issue of res judicata. (Tr. at 15-16).

there had been no substantial change from the earlier application. Based on the failure to adequately address this issue, it has not been preserved for review, and it should not be considered by the Court, in the event that this Court finds that the circuit court properly applied the doctrine of res judicata. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006) (stating that an issue raised on appeal but not argued in the brief, except in a conclusory fashion, will be deemed abandoned and will not be considered by the appellate court).

Issue 7 asserts that there was a "high probability of error" by the board in its finding that a variance should not be granted. The statement of this issue by Appellant addresses the merits of the decision rendered by the board. The merits of the board's decision to deny the variance is not an issue that is before the Court in the present appeal. In addition, Respondent asserts that whether the board may have been in error in its no-variance finding should not be a consideration in deciding whether to apply res judicata. Appellant is now arguing that there is "manifest error in the record." Appellant did not raise this issue to the circuit court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (stating that an issue is not preserved for appeal if it is not raised to the lower court). Moreover, were this Court to find "manifest error" in the board decision, such that res judicata could not apply, it would be ruling on an issue not presented to the Court, and the Court would be impermissibly "telegraphing" by advisory opinion how it would have the circuit court rule if the case was remanded for a determination on the merits. Therefore, Respondent submits that this Court should not address whether "manifest error" exists in the record.

ARGUMENT

I. This appeal should be dismissed because the same claim between the same parties is currently pending in the circuit court.

It is undisputed that the same action is currently pending before the circuit court. As Appellant admits, she brought the same action, for the same relief, in 2008. The circuit court has not ruled on her motion for reconsideration of the court's dismissal of her earlier appeal. Appellant now attempts to lay her failure to seek a ruling from the circuit court at Respondent's feet, by stating that the "city failed to present a final order on the motion." However, instead of ever seeking a ruling from the circuit court in the first action, Appellant pursued the identical appeal for a variance, hoping for a different outcome. Appellant failed to prosecute the earlier action and failed to seek an order resolving the matter for over two years. It is fundamentally unfair and an abuse of the system for Appellant to have sought a new, different ruling from the board on the same case while the prior action was still pending. If Appellant had obtained a favorable ruling from the board in the second action, surely she would have moved to dismiss the prior action. Upon information and belief, Appellant did not inform the board that the prior action was still pending. (Minutes of 2012 board hearing).

Appellant should not be permitted to sit on her hands in the first action without seeking some resolution, and then be allowed to bring the same action years later. Therefore, Appellant should be estopped from pursuing the current action until such time as the prior, pending action has been concluded.

Moreover, because the prior, identical action has not been concluded, this Court may be without subject matter jurisdiction to hear the current appeal. As it now stands, the same claim is pending in the circuit court. Appellant should not be able to file the same claim for relief while the previous matter is still pending in the circuit court. Neither the court system nor Respondent

should be subject to this duplicative use of resources, which could lead to different resolutions of the same claim.

Therefore, even though there may not have been a final determination of the first appeal, only due to Appellant's failure to prosecute the action and seek a ruling, res judicata should apply or Appellant should be estopped from pursuing the same claim while the earlier claim is pending.[4]

II. The circuit court was correct to apply the doctrine of res judicata even though the issue had not been raised to the Board of Zoning Appeals because the Board is required to "hear and decide" appeals for variances.

The Board of Zoning Appeals is a creature of statute. As a creature of statute, the board has only those powers and duties prescribed by statute. See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) (stating that "[a]s a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged"). The General Assembly has granted boards of zoning appeals power in only three categories of appeals: (1) appeals from determinations by a zoning administrator, (2) appeals for variances from the requirements of a zoning ordinance, or (3) permitting special exceptions. S.C. Code Ann. § 6-29-800 (Supp. 2013).

As specifically concerns appeals for variances, a board of zoning appeals has only the power to "hear and decide appeals for variance from the requirements of the zoning ordinance

[4] This Court can affirm the board's decision, or dismiss the appeal, for any ground appearing on the record. Rule 208(b)(2), SCACR. Respondent now moves that this action be dismissed because the same action is pending between the same parties. If the current matter is not dismissed, judicial resources are being duplicated and Appellant is getting two bites at the same apple. If the current matter is dismissed, the previous action can be brought to a conclusion. As an alternative, the Court could remand this matter to the circuit court for a hearing on whether the matter should be dismissed because the same claim is pending.

when strict application of the provisions of the ordinance would result in unnecessary hardship." Id.; S.C. Code Ann. § 6-29-800(D) (Supp. 2013). Similarly, the City's Board of Zoning Appeals has the duty "to authorize upon appeal in specific cases a variance from the terms of the [zoning ordinance] . . . ." City Code, § 17-112(3)a.1. The ordinance goes on to state the items that shall be set forth in an application for a variance. City Code, § 17-112(3)b.1. The ordinance also requires that notice of public hearing shall be given. City Code § 17-112(3)b.3. If an appeal is filed, and a public hearing is noticed, a "**hearing shall be held.**" City Code § 17-112(3)b.4. (emphasis added); see Grasso v. Zoning Bd. of Appeals, 794 A.2d 1016 (Conn. Ct. App. 2002) (finding that the board's responsibility to hold a hearing was a mandatory one where the statute required a zoning board to hear and decide appeals).

In exercising the power of hearing and deciding applications for variances, a board has only limited powers of resolution. A board may "reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination . . . ." S.C. Code Ann. § 6-29-800(E) (Supp. 2013); City Code § 17-114(a). Based on the seemingly mandatory responsibility to hold a hearing on a variance request, it is unclear whether a board has the power to dismiss a matter over which it has subject matter jurisdiction and where an applicant has properly completed all necessary forms.

Therefore, even if the defense of res judicata had been raised to the board at the February 2013 hearing, the board may not have had the power to issue a ruling in that regard. The board has only the power to hear and decide requests for variances, and then may only issue a decision granting or denying the request. Likewise, zoning staff does not have the power or authority to refuse to process applications or dismiss applications. City Code § 17-82 (stating the authority and powers of the Zoning Administrator). Therefore, the defense of res judicata did not need to

be raised in the first instance before the board, because it is unlikely that the board could issue a ruling dismissing a matter without providing a hearing on the merits, and deciding the issue on the merits.[5]

Moreover, by the time this matter reached the circuit court for review of the board's decision, the circuit court was sitting as an appellate court, and, therefore, was in a position to affirm the board's decision or dismiss the appeal "for any ground appearing on the record . . . ." Rule 208(b)(2), SCACR; Austin v. Board of Zoning Appeals, 362 S.C. 29, 37, 606 S.E.2d 209, 213 (Ct. App. 2004) ("When reviewing a Board decision, the circuit court sits as an appellate court."). "Under the present rules, a respondent – the 'winner' in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, ___, 526 S.E.2d 716, 723 (2000). Therefore, it was not necessary for zoning staff to present the doctrine of res judicata to the board and obtain a ruling in order to preserve the issue for appellate review. Id. The doctrine of res judicata was applicable upon an examination of the record on appeal presented to the circuit court, and the circuit court was correct to apply the doctrine.

As Appellant points out, zoning board determinations are relatively informal proceedings, where the rules of evidence are not strictly applied, and where members of the board are not required to have legal training or experience. See Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 656 S.E.2d 346 (2008) (finding that due process does not require the "full gamut of rules and procedures" in a local board hearing). Appellant also points out that a

[5] Respondent submits that it may be permissible for the board to dismiss matters where subject matter jurisdiction is lacking, or where an applicant has failed to submit a completed application form.

zoning board is not a court. But in the same breath, Appellant would have this Court find that the board is judicial enough that res judicata should have been asserted at the board hearing. Appellant cannot have it both ways – Appellant is asserting that the board is judicial enough that the issue needed to be raised and ruled upon, but at the same time Appellant is claiming, because the board is not a court, and does not exhibit enough attributes of traditional adversarial proceedings in the circuit court, that the doctrine should not apply under any circumstances.

The more informal nature of zoning board hearings works both ways. The informal nature may be offensive to some applicants who would desire a prescribed mode of procedure, or that zoning staff be lawyers, or that board members be judges.[6] On the other hand, though, the informal nature allows for efficiency and for applicants to present their case without having to be burdened with rules of procedure and evidence. For example, in the most recent board hearing, Appellant presented hearsay evidence regarding the estimated costs to perform repairs and renovations to the home. (Minutes of Feb 12, 2013, board hearing). This evidence was not objected to nor excluded from the board's consideration. However, in its fact-finding capacity, the board obviously discounted this evidence and chose not to find this evidence credible, as it is entitled to do. (Written decision of board, dated March 12, 2013).

The board might not be authorized to hear and decide legal arguments, such as whether an ordinance is constitutional or whether a particular zoning decision constitutes a taking, or, in this case, whether a matter should be dismissed on the ground of res judicata. See Dobo v. Zoning Bd. of Adjustment, 562 S.E.2d 108 (N.C. Ct. App. 2002), overruled on other grounds by 576 S.E.2d 324 (N.C. ____) (stating that a zoning board sits in a quasi-judicial capacity and has only the authority granted under a state statute, and is without statutory power or authority to rule

[6] Counsel does not represent the zoning staff or the board at the board hearings. Counsel is normally engaged, as in this case, only at the time that an appeal is made to the circuit court.

on constitutional challenges to an ordinance). Appellant claims that attributes such as the lack of formal pleadings or trial-like proceedings demonstrate why board proceedings are not a form of fair litigation and why it would be unfair to apply the doctrine of res judicata to zoning board proceedings. On the other hand, Respondent asserts this is exactly why the doctrine need not be raised and decided by the board - because of the informal nature of board proceedings it is not necessary to raise technical legal arguments that the board may have no authority to hear and decide. Moreover, it is not at all unfair for a circuit court, after considering the record, to determine that an earlier board decision is res judicata to a successive application.

Therefore, the circuit court did not err in reviewing and deciding the matter based on the doctrine of res judicata.

Appellant also asserts that the doctrine of res judicata is not available because there has not been a final determination on the merits in the proceedings arising from the 2008 applications. Appellant contends that the variance was not determined on the merits because the circuit court dismissed the appeal for untimeliness. No matter the reason for the circuit court's dismissal of the first appeal, the decision reached by the board was on the merits. The board heard the matter on July 8, 2008, and rendered a written decision on January 16, 2009. It is undisputed that the board's decision was on the merits of the application for variance. Appellant is attempting to use her procedural and jurisdictional error to timely file the first appeal as an offensive weapon against the application of res judicata. If the circuit court did not reach the merits in the first proceedings it was only because of Appellant's failure to perfect the appeal. Appellant cannot now claim that because of her mistake that res judicata should not apply.

Despite the ruling on the merits from the board, Appellant further argues that there has not been a final determination sufficient to invoke res judicata because the circuit court's

dismissal of the earlier appeal has not been rendered final. As discussed above in Argument I, if the matter has not been rendered final, it is only because of Appellant's failure to prosecute and seek a resolution. The prior, pending action should be deemed final, or this matter should be dismissed while the prior action is pending.

III. The circuit court was correct in finding that Appellant's most recent application for a variance was barred by the doctrine of res judicata. Res judicata applies to zoning decisions unless it can be shown that there has been a substantial change of circumstances since the earlier ruling.

The doctrine of res judicata should apply to quasi-judicial zoning board proceedings, and the doctrine should not be subject to the same strict elements of the doctrine as applied in a traditional litigation forum.

Res judicata applies to administrative zoning decisions in order to promote finality of decisions unless it is shown that there has been a substantial change of circumstances since the earlier ruling. 83 Am.Jur.2d Zoning and Planning 741. "[I]t is well established that the doctrine of res judicata applies to administrative decisions such as those relating to special permits and variances, [but] 'the rule of res judicata does not bar the making of a new application for variance, . . . upon a proper showing of changed circumstances or other good cause warranting reconsideration by the local authorities.'" 4 Am. Law of Zoning § 40:49 (5th ed. 2013), quoting Cohen v. Borough of Fair Lawn, 204 A.2d 375 (N.J. App. Div. 1964).

Unfortunately, this issue has never been addressed head-on in South Carolina. In Price v. City of Georgetown, 297 S.C. 185, 375 S.E.2d 335 (Ct. App. 1988), this court addressed the application of the doctrine of res judicata in an appeal from a denial of a request for rezoning. The landowner petitioned the city to rezone his property. Id. at 186, 375 S.E.2d at 336. The city denied the request and the landowner appealed. Id. The city moved for summary judgment on the ground of res judicata and the circuit court dismissed the case. Id.

On appeal, this court found that the doctrine did not apply because the city had elected to pass an ordinance which frustrated the finality of a ruling by the zoning board if the landowner waited one year and brought the same action. Id. at 187-8, 375 S.E.2d at 337. A landowner was specifically allowed to bring successive rezoning requests every 12 months. Id. Even though the court found that the doctrine had been legislatively abolished in the particular circumstances present in Price, the court realized and acknowledged that res judicata could apply to zoning board decisions unless the doctrine had been legislatively repealed. Id. "Generally, . . . absent a statute [abolishing res judicata], changed circumstances are required to grant a variance or special exception previously denied." Id. Here, the City has not legislatively abolished the doctrine of res judicata to allow successive applications.

Respondent acknowledges that Price did not specifically address the elements of res judicata that need to be applied where a variance has been previously denied. Price did, however, touch on the common theme that successive applications would not be allowed when the applicant has not shown a change of circumstances. As discussed earlier, a zoning board case is not the same as a traditional judicial proceeding, and different elements should apply. Other jurisdictions have readily recognized this and have held that changed circumstances need to be shown before a successive application can be considered, and that an earlier decision will be res judicata where changed circumstances are not shown.

For example, in Callowhill Center Assocs., LLC v. Zoning Bd. of Adjustment, 2 A.3d 802 (Pa. Commw. Ct. 2010), the court affirmed a decision by the board of zoning adjustment denying a second application for variance to install an advertising sign. The court held that an earlier, identical application, that had been denied on the merits, was res judicata for the second application. In its discussion, the court stated that "res judicata will bar relitigation of a request

for a variance if four elements concur: (1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the persons and parties to the action; and (4) the identity of the quality in the persons for or against whom the claim is made, and then, only if there are no substantial changes in circumstances relating to the land itself." Id. at 809; Bell v. Zoning Bd. of Adjustment, 479 A.2d 71 (Pa. Commw. Ct. 1984). Generally, where a variance has been denied, a subsequent application may be denied by res judicata if no substantial changes have occurred since the earlier denial. Namcorp, Inc. v. Zoning Hearing Bd. of Horsham Tp., 558 A.2d 898 (Pa. Commw. Ct. 1989); see Porter County Bd. of Zoning Appeals, 530 N.E.2d 1212 (Ind. Ct. App. 1988) (finding res judicata applicable to board proceedings and stating that a zoning board should not repeatedly reconsider a determination denying a variance absent a change of circumstances).

The Leviner case, cited by Appellant, is also instructive in this situation, to the extent that administrative cases are more analogous to the present case than a civil litigation matter. Leviner v. Richardson, 443 F.2d 1338 (4th Cir. 1971). In Leviner, the court held that a prior administrative determination should not be res judicata "where new and material evidence is offered which is of sufficient weight that it may result in a different determination." Id. at 1343. This pronouncement regarding the use of res judicata in administrative decisions is very similar to the use advocated by Respondent in this case. Leviner is instructive because it shows that res judicata can be applied in non-traditional forums outside of the strict standards, and it shows that res judicata can be applied in situations where there is no change of circumstances from one application to the next.

Respondent does not contend that the same landowner can never file a successive application for variance concerning the same property. However, in order to do so, the applicant

must show some change of circumstances from the time of the first application. Otherwise, there would be no finality and an applicant would never appeal from an adverse ruling and would continuously keep making the same application.

Appellant apparently argues for a categorical rule that the doctrine of res judicata should never apply to zoning board hearings. However, such a categorical rule would seriously burden and jeopardize the ability of boards to efficiently and effectively pursue their duties as set forth by the General Assembly. A categorical rule would incentivize successive applications for variances. If the doctrine of res judicata cannot be applied at some stage of a board proceeding, boards would run the risk of being overrun with successive applications. There would be no reason for an applicant who had been denied a variance, or other relief, from a board to ever pursue an appeal with the circuit court.

Appellant correctly cites the elements for the application of the doctrine of res judicata. However, the elements cited by Appellant are those elements traditionally applied to civil suits. Appellant does not explain why those traditional elements necessarily would apply to zoning board proceedings. As Appellant recognizes, a board hearing is an entirely different creature. It would not necessarily make legal sense to superimpose the traditional elements of res judicata over a board hearing. Rather, it is quite obvious that the doctrine of res judicata can be, and is, applied to zoning board proceedings, albeit with different elements and considerations than those applied in the traditional litigation arena.

Appellant argues that res judicata should apply only when an agency, or board, has acted in a "judicial capacity." Appellant goes on to assert that an agency acts in a judicial capacity when numerous safeguards are provided. Respondent does not agree that a board or an agency needs to be acting only in a "judicial capacity" for the doctrine to apply, but, in cases before the

board, most, if not all, of the safeguards cited by Appellant are present. First, applicants are certainly entitled to be represented by counsel. S.C. Code Ann. § 6-29-800(D) (Supp. 2013). Next, there is always the ability and opportunity to present memoranda of law or exhibits to the board.[7] Next, a party would certainly have the chance to object to evidence at the hearing. Finally, a litigant is safeguarded by the requirement that the board issue a final decision in writing, with all findings of fact and conclusions of law separately stated. S.C. Code Ann. § 6-29-800(F) (Supp. 2013).

Appellant is advocating that she, and others who have been denied variances, be able to clog the board's monthly docket of cases by bringing successive applications for the same relief. The only real way to discourage or prevent successive applications is by the application of the doctrine of res judicata. If the doctrine cannot be applied in some fashion, at some stage in the proceedings, zoning boards would likely face insurmountable numbers of applications. It may even be likely that applicants, who once thought they had no shot at success, and so did not apply, will now continuously apply in the hopes of wearing the board down.

Therefore, the circuit court did not err in applying the doctrine of res judicata to the present appeal. There is no categorical rule against the application of the doctrine in zoning appeals.

IV. The circuit court correctly found that the doctrine of res judicata barred the second application for variance because Appellant did not show a change of circumstances.

Appellant has not demonstrated a change of circumstances that would have allowed a successive application for a variance. In fact, Appellant's submission to the board states that she

[7] Appellant takes issue with the Case Summary prepared by zoning staff prior to the hearing. The case summary is made available to the board, and to all parties and the public prior to the board hearing by way of hyperlink at the time the agenda is published on the City's website. The Case Summary is not an ex parte communication.

"made the same or similar application some years ago . . . ." (BOZA 041) The lot size is still the same, if not smaller than originally represented,[8] and the home has not been repaired or remodeled since the original application. In both applications, Appellant asserts that the home is a duplex and that she desires a variance to continue such use. The zoning district has not changed during the time from one application to the next. In short, the applications do not express any changed circumstances. Each application seeks a variance to the lot size so that the property can "continue" as a duplex.

In support of Appellant's most recent application for a variance, she provided to the board a document entitled "Expected Submitted Testimony." (BOZA 016 – 021) Upon analysis, this document is identical in almost all respects to the evidence presented in support of the original application for variance. For example, Appellant submitted an affidavit in support of her earlier appeal. (Affidavit, dated February 25, 2010). Appellant's "Expected Submitted Testimony" is hardly more than a cut-and-paste of the affidavit submitted two years earlier. The only apparent difference between the two documents, which is inconsequential, is some additional information in the more recent document concerning the zoning classification of the property and some other descriptions of the property itself. While the information may be additional, it does not demonstrate any changed circumstances. The additional information simply states facts concerning the use of the property and its zoning classification – facts which Appellant takes great pains to show have not changed in many years. ("Expected Submitted Testimony", BOZA 016-021).

According to the official minutes of the 2008 board hearing, Appellant's main argument for the variance was the alleged economic hardship to convert the use from a duplex into a

[8] The original application for variance stated the lot size was 7,644 square feet. The most recent application states that the lot size is 6,786 square feet.

single-family residence. Appellant also argued in 2008 that she had made provisions for parking in the rear of the property. (Minutes of the July 8, 2008 meeting). These are the identical arguments that were most recently made to the board in support of the application for variance. (BOZA 019-021)

To the extent that a change in the character of the area could be deemed a change of circumstances allowing a successive application for variance, it is clear that the character of the area has not changed since the first application. In 2008, Appellant told the board that there were "a lot of duplexes in the area." Minutes of July 8, 2008, board meeting. The Zoning Administrator also indicated in 2008 that there were five properties with duplexes in the area. Id. Fast forward to 2013, and Appellant agrees that "there are only about five duplex units in the area." (BOZA 043) In addition, a letter submitted by a nearby resident in opposition to the variance request attests to the fact that the character of the area has not changed. The letter indicates clearly that "[t]he make-up of our 13 parcel block remains the same as explained in 2008 . . . ." (BOZA 036) The letter also explains that nothing has changed with the subject home in the four years since the first variance denial other than some improvements aimed at maintaining a duplex. Id.

The circuit did not err in finding that there had not been a change of circumstances between the first application and the second application for a variance. Therefore, the first decision was res judicata.

CONCLUSION

For the reasons stated herein, this Court should dismiss Appellant's appeal on the ground that the identical action is pending in the circuit court. In the alternative, this Court should

affirm the judgment of the circuit court finding that Appellant's successive application for variance is barred by the doctrine of res judicata.

Peter M. Balthazor
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
Phone: (803)737-4242
Fax: (803)737-4250
Attorney for Respondent

We Are Columbia

Office of the City Attorney
Post Office Box 667 • Columbia, SC 29202 • (803) 737-4242 • Fax (803) 737-4250
July 30, 2014

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Frieda H. Dortch v. City of Columbia Planning & Development Services/Zoning Division
Appellate Case No.: 2013-002686

Dear Ms. Kitchings:

Enclosed please find for filing the original and a copy of the Respondent's Initial Brief, Designation of Matter to be Included in the Record on Appeal and Proof of Service in the above-referenced matter. Please file the original and return the clocked copy to our office via our courier. By copy of this letter, I am also serving a copy upon counsel for the Appellant.

Please call me if you have any questions concerning this correspondence or any other matter.

Sincerely,

Peter M. Balthazor
Assistant City Attorney

PMB/tmb
Enclosure(s) as Stated

cc: M. Baron Stanton, Esquire